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No. 79-218

In the Supreme Court of the United States

OCTOBER TERM, 1979

EUGENE A. ZIPERSTEIN AND JOSEPH A. LENTINI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO THE BRIEF IN OPPOSITION FILED BY THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 601 F.2d 281.

JURIDICTIONS

The judgment of the Court of appeals was entered on May 22, 1979. A petition for rehearing was denied on July 11, 1979. The petition for a writ of certiorari was filed on August 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this petition presents an example of an impermissible seizure . . . where Petitioners' employee stole records (and unopened mail) from a private premises and then, after consulting with the Department of Justice, turned the records and unopened mail over to the United States Attorney?

2. Whether the above facts bring this Petition within the parameters of *Walter* [*and Sanders*] v. *U.S., cert. grted,*. 100 S.Ct. 227 (1979)?

CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States Constitution:

AMENDMENT [IV.]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF PERTINENT FACTS

As relating to the only issue and argument proffered in this reply brief we suggest that *inter alia,* the trial evidence showed that from September, 1975, to and including July, 1976, the Petitioner had in his employment a pharmacist named Harlan Eisentraut. His trial testimony is, in part, as follows:

> He is a pharmacist. From August or September, 1975, to July 31, 1976, he worked at three pharmacies in clinics associated with Eugene Ziperstein (Tr. 2735).

> On July 29, 1976, while working at County Family Medical Center, he called the Federal Bureau of Investigation and spoke to Agent Kelly. He told Kelly he had evidence and knowledge of wrongdoing. "Well, at that time I had knowledge that prescriptions I had filled, the quantities or integrity had been increased and then I found at 11:35 Saturday night quite a supply of signed Welfare prescriptions not dated by one or probably three different doctors." (Tr. 2736).
>
> These documents were in a storage room in the clinic. Kelly said he was interested in it and wanted to see it (Tr. 2737). Eisentraut wanted to bring the documents to Kelly and Kelly agreed he should bring them to the Federal Building (Tr. 2738).
>
> On July 31, 1976, Eisentraut brought the documents to Mr. Conlon's office. These consist of Government Group Exhibits 201-A, 201-B, 206-A, 206-B, 206-C 206-D and 206-E as well as many other prescriptions filled out in the clinics before he began working there (Tr. 2741). He brought in about 200 pre-stamped prescriptions signed by Dr. Guthrie (Tr. 2743).
>
> He did not get Mr. Ziperstein's permission to take the documents (Tr. 2744). He also took some unopened mail from the pharmacy (Tr. 2745).
>
> Mr. Conlon gave him back the letters. He started a new job the next day (Tr. 2746).
>
> He was very much aware there was an investigation going on and the documents would have a bearing on it. He told this to Agent Kelly. Two FBI agents had been out to talk to him previously but he had not talked to anyone from the FBI or U.S. Attorney's office before July 29, 1976 (Tr. 2747-48).

The testimony and evidence offered by the government during the suppression hearing included the testimony of F.B.I. Agent David Kelly and an affidavit by government

trial counsel, William F. Conlon.[1] The testimony of Agent Kelly included, in part, that late on the night of July 29 or July 30, he returned a phone call to Harlan Eisentraut, who related that he was a pharmacist working for Mr. Ziperstein and had information concerning Ziperstein that he wanted to relate to the F.B.I. (Tr. 2749-50). He set up an appointment for Eisentraut with Mr. Conlon. He told Eisentraut to bring any information he had; he does not specifically recall telling Eisentraut to bring any documents with him (Tr. 2750). He does not recall whether Eisentraut said he had documents relating to Ziperstein (Tr. 2751). He told Conlon an individual named Harlan Eisentraut had contacted the office and had information concerning his employment with Eugene Ziperstein (Tr. 2752). He does not recall mention of Dr. Guthrie or blank prescriptions in talking to Eisentraut (Tr. 2752).

The affidavit of the U.S. Attorney stated, in part, that *Eisentraut* indicated "that he was turning over the documents voluntarily and that he had authority to remove the documents he had brought forward and that they were properly in his custody and control" (R. 75, pg. 6). The same affidavit then goes on as follows:

> "I advised Mr. Eisentraut that the rubber stamps, unopened correspondence, and other documents should be returned to the pharmacy since I could not ascertain that there was possible evidence of any criminal misconduct" (R. 75, pg. 6-7).

The trial court saw fit to comment, at the end of the suppression hearing, "it may be wrong to take them out of the clinic and deliver them to the F.B.I." (Tr. 2735).

The saga really comes into focus when one considers the scenario of events. The employee, Eisentraut, saw the

[1] The affidavit of A.U.S.A. Conlon is reproduced in the original record at R. 75, pp. 5-7.

documents in a storeroom on a Saturday night (July 29, 1976) at about 11:35 p.m. These documents included, *inter alia*, pre-signed [by doctors] blank prescriptions (Tr. 2763). On this same Saturday night Eisentraut had telephonic contact with Agent Kelly and some of the items were described by Eisentraut to the Agent (Tr. 2736). The documents (records) were in a storage room and these were not documents or records that Eisentraut had worked on during the ordinary course of his duties. The documents were not *STOLEN* until after F.B.I. Agent Kelly told Eisentraut he was interested in the evidence and wanted to see it and until *after* Agent Kelly urged that Eisentraut should bring the documents to the Federal Building (Tr. 2738). *The produced documents permeate[d] the trial.* The documents, which were brought by Eisentraut to the U.S. Attorney's Office on July 31, 1976, included several hundred prescriptions including, approximately two hundred (200) pre-stamped prescriptions signed by Dr. Guthrie (Tr. 2741, 2743). It is uncontested that petitioner gave no permission to either look at or seize the records (Tr. 2744). Petitioner also urges that the Court make note that Eisentraut was not an innocent "passerby". Eisentraut was very much aware of the fact that there was an on-going investigation and that these records played a part in that investigation (Tr. 2747-49). Petitioner represents that the facts herein detailed fall within the parameters of *Walter* v. *U.S.*, cert. granted, 100 S.Ct. 227 (October 15, 1979).[2]

[2] The Court also granted certiorari in *Sanders* v. *U.S.*, #79-148. Both *Walter* and *Sanders* were jointly tried and convicted (Cf., *U.S.* v. *Sanders*, 592 F.2d 788 (C.A. 5, 1979); on denial of rehearing, 597 F.2d 63 (C.A. 5, 1979).) *Sanders* v. *U.S.*, is cited at 100 S.Ct. 227 (October 15, 1979). In the *Sanders* Petition for Certiorari (#79-148) Questions 2 and 3 offer "similar search" and seizure questions (25 Cr.L. 4164). Thus, the instant petition falls squarely within the parameters of *Walter* and *Sanders*.

ARGUMENT

The record in petitioner's case eloquently reveals that an individual intimately exposed to a government investigation [Eisentraut] stole records and unopened mail after conversing with an F.B.I. Agent during the evening hours of July 29, 1976. Eisentraut, had not taken anything before talking to F.B.I. Agent Kelly. After Eisentraut was told that the agent was interested and wanted to see the evidence . . . Eisentraut then brought to the office of the U.S. Attorney stolen items which included, *inter alia,* "unopened mail". Thus, the F.B.I. and the U.S. Attorney accepted property . . . stolen . . . but not stolen until after the F.B.I. said they were interested in the evidence. The U.S. Attorney upon seeing that the stolen items included unopened mail . . . caused the mail and other non-usable items to be returned (R. 75, pg. 6-7). With this in mind the government, in their brief in opposition, offers the theory that certiorari should *not* be granted because "we believe there is no reasonable possibility that this Court would do so in *Walter* and *Sanders* [overrule *Burdeau* v. *McDowell,* 265 U.S. 465 (1921)] (Gov. Brf., pg. 5).

The first question presented in the *Walter* Petition for Certiorari is:

> "Was FBI's acceptance from third party of films, which allegedly were wrongfully in that party's possession, subject to Fourth Amendment warrant requirement, or alternatively, does rule fashioned fifty years ago in *Burdeau* v. *McDowell,* 256 U.S. 465, require two-step analysis of 'seizure'—that by third party and that by government—in case in which First Amendment concerns are involved?"[3]

[3] *Walter* v. *U.S.*, Petition for Certiorari, #79-67, 25 Cr.L. 4160-4161.

In petitioner's case the Court of Appeals, while affirming petitioner's conviction used *Burdeau* while assuming for the sake of their decision that even had Eisentraut been without authority to take the records . . . *Burdeau* compelled affirmation of the conviction (601 F.2d at 290).

A glaring fault in the Court of Appeals' reasoning is their misunderstanding of the transcript. The Court of Appeals assumed that Eisentraut gained possession of the documents BEFORE CONTACTING THE GOVERNMENT AND THAT HE TURNED THEM OVER WITHOUT GOVERNMENT INDUCEMENT (601 F.2d at 290, emphasis ours). *The transcript is quite to the contrary.* As we have pointed out in our Statement of Facts, *ante,* Eisentraut called the F.B.I. at 11:35 p.m. on a Saturday night and the F.B.I. Agent wanted to see the evidence and encouraged Eisentraut to produce it the following Monday . . . which Eisentraut did. Eisentraut himself, was one of several persons then under investigation. The plot goes further in that amongst the things that Eisentraut stole and turned over to the F.B.I. was unopened mail which . . . the United States Attorney directed be returned. The government, at page 5 of the brief in opposition, perpetuate the error in facts by asserting:

> "No such private action under government instruction is present in this case. Eisentraut's delivery of the incriminating documents to the FBI was entirely voluntary and not the produce of government inducement and encouragement". (Gov. Bfr. pg. 5).

While the government suggests that certiorari be denied in this case because the government finds there is no reasonable possibility that this Court will overrule *Burdeau* (Gov. Brf. pg. 5) the criticism of *Burdeau* is not without merit. As Circuit Judge Wisdom points out in *U.S.* v. *Sanders:*

"*The Burdeau rule has spawned much critical literature.* Today, the Court extends that rule into an area where the constitutional requirements of the fourth amendment are to be 'accorded the most scrupulous exactitude'. *Stanford* v. *Texas,* 1965, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431. Placing the government's acceptance of expressive materials outside the scope of the fourth amendment, by 'cast[ing] the government in the role of a passive receiver . . . absolve[s] the government of any first amendment responsibilities or restrictions . . . [It] allows for the possibility of government-sanctioned private censorship without judicial supervision.' Note, Private Searches and Seizures, supra at 467. In short, the majority rule frustrates the Supreme Court's efforts to utilize the fourth amendment as a source of procedural guarantees aimed at controlling governmental action that affects freedom of expression. The approach of the Eighth Circuit Court of Appeals in *Kelly,* which subjects the government's taking of expressive materials discovered in a private search to the scrutiny of the fourth amendment, properly guards both the first amendment rights and the privacy interests of absent third parties." (592 F.2d at 804).[4]

The complexity of the "private search" doctrine has caused the Circuits to split . . . in an effort to reduce the force and effect of the *Burdeau* decision. For example, in *U.S.* v. *Haes,* 551 F.2d 767 (C.A. 8, 1977), the Court reverses an obscenity conviction with directions that a motion to suppress be granted finding, *inter alia:*

> "The courts have engaged in a two prong analysis of 'allegedly' private searches, however, separately analyzing the search aspect apart from the actual seizure in order to determine whether there was sufficient

[4] Judge Wisdom likens the seizure by the government after the private search to *Chadwick* violations (*U.S.* v. *Chadwick,* 433 U.S. 1 (1977) ; 592 F.2d at 804). At 592 F.2d 804, n. 10, Judge Wisdom points out a string of authorities that have criticized the *Burdeau* private search concept.

> *governmental participation in either aspect to require fourth amendment protection.* See *United States* v. *Sherwin,* 539 F.2d 1, 6-7 (9th Cir., 1976), *United States* v. *Kelly, supra,* 529 F.2d at 1371. Thus, as in *Sherwin* and *Kelly,* when the search was held to be a private search, the inquiry then focused on the nature of the seizure and whether it passed constitutional muster" (551 F.2d at 770; empsasis supplied).[5]

The Supreme Court of Montana in *State* v. *Helfrich,* ..... P.2d ....., decided October 3, 1979, 26 Cr.L. 2092, relied on the state Constitution's provisions on the right of privacy and search and seizure, and refused to use the private search doctrine of *Burdeau* v. *McDowell,* 256 U.S. 465 (1921) to justify a warrant based on evidence seized through a private party's trespass of the defendant's back yard.

In sum, our petition presents a rather startling collection of facts. An individual pharmacist, himself the subject of some investigation, undertakes a search in an area which does not fall within his ordinary pharmaceutical duties (searching a storeroom). Post-search he conveniently calls the F.B.I. (at 11:30 p.m. on a Saturday night). The F.B.I. agent, making no effort to secure any warrant of any kind to search this storeroom, urges the psuedo-defendant to bring the evidence in. The seizure (illegal in our view) is not completed until the United States Attorney on July 31, 1976, is presented with what was stolen from the storeroom on July 29, 1976. But for the F.B.I. agent's urging that the records be stolen from the storeroom . . . the government would have been without the evidence (unless, of course, they had gone about getting a search warrant). It is with more than passing interest that we reproduce a few lines from the government's brief in opposition:

[5] In *Haes* Circuit Judge Webster dissented, urging that there was no violation of the fourth amendment in either the search or seizure (551 F.2d at 772-4).

> "Accordingly, whatever may be the resolution of the private search issue there (speaking to *Walter* and *Sanders*), the government's acquisation of evidence here was proper, and further review is not warranted" (Gov. Brf. pg. 5-6).

Earlier, the same brief in opposition states:

> "Petitioners' first question presented, however, is similar to one included in the petitions for a writ of certiorari in *Walter* and *Sanders*" (Gov. Brf. pg. 4).

Petitioner views these contradictions as an invitation to review that which occurred in this case . . . with the hope that the Court does not grant review. Under such circumstances it is respectfully submitted that the granting of certiorari is here appropriate.

CONCLUSION

The petitioners, Eugene A. Ziperstein and Joseph A. Lentini, file no reply to the government's severance argument. The petitioners are content to rely on their opening petition as relating to severance *vel non*. The "search and seizure question" presents a situation of exceptional importance in the administration of criminal justice. Therefore, it is respectfully urged, that the instant petition for certiorari be granted and this case be joined with the consolidated cases of *Walter* and *Sanders* v. *U.S.*, cert. granted, 100 S.Ct. 227 (October 15, 1979).

Respectfully submitted,

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